KEKATONG SDN BHD

v.

DANAHARTA URUS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-02-221-2002]
18 JUNE 2003

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Appeal against dismissal of application - Section 72 of Pengurusan Danaharta National Bhd Act 1998 prohibits court from granting injunction against respondent - Serious questions of law and fact to be tried - Balance of convenience in favour of appellant - Whether s. 72 denied appellant access to justice in contravention of art. 8(1) Federal Constitution*

CONSTITUTIONAL LAW: *Legislation - Validity of s. 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Section 72 prohibits court from granting injunction against corporate body in any circumstances - Litigant denied right to obtain injunctive relief - Court prohibited from exercising judicial discretion - Whether s. 72 contravenes art 8(1) Federal Constitution - Whether Act passed in the public interest - Whether preamble to Act could be used to interpret on constitutionality of s. 72*

The appellant, in the court below, applied for an interlocutory injunction against the respondent from selling the appellant's land pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). The learned judge dismissed the application. Hence, the appellant's appeal to this court. The main issue was whether the appellant was barred from obtaining an injunction against the respondent in view of s. 72 of the Act.

Held:
Per Gopal Sri Ram JCA

[1] There were several hotly contested issues of fact on the limitation issue, in particular as to when the cause of action arose. Also, the interpretation of s. 2 of the Act was a serious question of law that did not merit summary disposal on the hearing of an application for injunction. The balance of convenience, too, lay in the appellant's favour. If the injunction was not granted, the appellant suffered the risk of losing its land forever.

By contrast if the injunction was granted, the respondent's right, if any, over the disputed land was merely postponed to after trial. Accordingly, in the ordinary way an injunction should issue against the respondent. Therefore, the learned judge was wrong in holding that there were no serious questions to be tried and for refusing the injunction on that ground. (pp 386 a-h & 387 a-d)

[2] Access to justice is an integral part of art. 8(1) of the Federal Constitution ('Constitution') and fundamental liberties guaranteed by Pt. 11 of the Constitution, including art. 8(1), should receive a broad, liberal and purposive construction. Section 72 of the Act prohibits a court from, *inter alia,* granting an injunction against the respondent and that means the respondent enjoys blanket immunity from injunctive relief. It follows that s. 72 is contrary to the rule of law housed within art. 8(1) of the Constitution. It fails to meet the minimum standards of substantive and procedural fairness by denying to an adversely affected litigant the right to obtain injunctive relief against the respondent in any circumstances. Furthermore, if it later transpired in trial that the appellant was right in its argument that the respondent was not entitled to sell the appellant's land, the appellant might only recover damages. Land has a special value the loss of which may not be adequately compensated by an award of damages. (pp 396 f-h & 397 a-d)

[3] A particular Act should not be upheld as being constitutional based on the consideration that its preamble states that it was passed in the public good and interest. All Acts of Parliament are passed in the public good and interest. Furthermore, it is settled law that a preamble should not be used as an aid to interpret a provision in a statute that is clear and unambiguous. Section 72 of the Act is clear and unambiguous. It states clearly that there shall be no order of restraint against the respondent. (pp 397 g-h, 398 a-h & 399 a)

[4] Although the court could take judicial notice of the fact that the Act was passed to meet an economic exigency, the Act was not a special law made pursuant to art. 150 of the Constitution to meet a threat to the economic life of the nation. It is an ordinary Act of Parliament passed for a particular purpose, namely, to deal with non-performing loans. Like any other Act, its provisions must not be inconsistent with the Constitution. Further, the grant of an injunction is at the discretion of the court and s. 72 of the Act completely prohibits a court from exercising its judicial discretion. (p 399 b-d)

[5] Section 29 of the Government Proceedings Act 1956 was not similar to s. 72 of the Act as s. 29 did not prohibit the grant of any injunction, unlike s. 72. What s. 29 of Act 1956 sought to prohibit are permanent injunctions and not temporary injunctions. The injunction sought in the present case was temporary and not permanent. (p 400 b-g)

[6] Although art. 121 of the Constitution provides *inter alia* that the High Court shall have jurisdiction and powers as may be conferred by or under Federal Law, the Federal Law can be held invalid on any constitutional ground available to a litigant. Furthermore, it is a serious jurisprudential error to speak of the High Court as having only statutory jurisdiction to grant injunctions. (pp 401 c-h & 402 a-e)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Di mahkamah bawah, perayu memohon untuk injunksi interlokutori menghalang responden daripada menjual tanah perayu selaras dengan Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta tersebut'). Hakim bijaksana menolak permohonan tersebut. Maka, rayuan perayu ini. Isu utama ialah sama ada s. 72 Akta tersebut menghalang perayu daripada memperolehi injunksi terhadap responden.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Terdapat beberapa isu fakta untuk diperdebatkan mengenai had masa terutamanya bila kausa tindakan bermula. Lagipun, isu interpretasi s. 2 Akta tersebut merupakan satu soalan undang-undang serius yang tidak patut menerima penyelesaian terus dalam pembicaraan permohonan injunksi. Juga, imbangan conveniens memihak kepada perayu. Jika injunksi tidak diberikan, kemungkinan perayu akan kehilangan tanahnya itu. Jika injunksi diberikan, hak responden, jika ada, atas tanah perayu hanya akan ditangguhkan selepas perbicaraan. Memandangkan ini, satu injunksi patut diberikan kepada perayu. Hakim bijaksana salah memutuskan bahawa tiada soalan-soalan serius untuk dibicarakan dan menolak permohonan injunksi atas alasan ini.

[2] Akses kepada keadilan adalah bahagian penting per. 8(1) Perlembagaan Persekutuan ('Perlembagaan') dan kebebasan asasi yang terjamin oleh Bahagian 11 Perlembagaan termasuk per. 8(1) patut menerima pentafsiran yang luas, liberal dan purposif. Seksyen 72 menghalang mahkamah daripada, *inter alia*, memberikan injunksi kepada responden dan itu

bermakna responden mempunyai kekebalan dari relief injunksi. Maka, s. 72 bertentangan kedaulatan undang-undang yang termaktub di dalam per. 8(1) Perlembagaan. Ia gagal memenuhi taraf minimum keadilan substantif dan prosedur kerana menolak seorang litigan yang terjejas haknya memperolehi relief injunksi terhadap responden dalam keadaan apapun. Lagipun, jika didapati di dalam perbicaraan kemudiannya bahawa perayu adalah betul dalam hujahannya bahawa responden tidak berhak menjual tanah perayu, perayu hanya akan mendapat ganti rugi. Tanah mempunyai nilai yang istimewa dan ia tidak boleh digantikan secukupnya oleh satu award ganti rugi.

[3] Sesuatu Akta tidak boleh dipertahankan sebagai berperlembagaan semata-mata kerana mukadimahnya memperuntukkan Akta tersebut diluluskan demi kepentingan dan kebaikan awam. Semua Akta Parlimen memang diluluskan demi kepentingan dan kebaikan awam. Lagipun undang-undang telah pun menetapkan bahawa mukadimah sesuatu Akta tidak boleh digunakan untuk mentafsirkan peruntukan Akta yang jelas dan tidak kabur. Seksyen 72 Akta tersebut adalah jelas dan tidak kabur. Seksyen tersebut jelas menetapkan bahawa tiada perintah yang boleh dibuat terhadap responden.

[4] Walaupun mahkamah boleh mengambil pengiktirafan penghakiman bahawa Akta tersebut diluluskan bagi tujuan memenuhi keadaan ekonomi yang mendesak, Akta tersebut bukanlah undang-undang khas yang diperbuat selaras dengan per. 150 Perlembagaan disebabkan ancaman kepada keadaan ekonomi negara. Akta tersebut adalah Akta Parlimen yang biasa bagi tujuan tertentu, iaitu untuk mengendalikan pinjaman-pinjaman yang tidak disempurnakan. Seperti Akta yang lain, peruntukan-peruntukan Akta tersebut tidak mesti bertentangan dengan Perlembagaan. Lagipun, pemberian injunksi adalah dalam budi bicara mahkamah dan s. 72 melarang mahkamah daripada menggunakan budi bicara kehakimannya.

[5] Seksyen 29 Akta Prosiding Mahkamah 1956 tidak sama dengan s. 72 Akta tersebut kerana s. 29 Akta 1956 tidak melarang mana-mana pemberian injunksi. Seksyen 29 melarang injunksi tetap dan bukan injunksi interlokutori. Injunksi yang dipohon di dalam kes semasa adalah injunksi interlokutori dan bukan injunksi tetap.

[6] Walaupun per. 121 Perlembagaan menetapkan *inter alia* bahawa Mahkamah Tinggi mempunyai bidang kuasa dan kuasa-kuasa di bawah undang-undang persekutuan, undang persekutuan tersebut boleh dijadikan tak sah atas apa-apa alasan berperlembagaan yang tersedia kepada litigan. Adalah satu

kesalahan jurisprudens yang serius untuk berpendapat bahawa Mahkamah Tinggi hanya mempunyai bidang kuasa yang statutori untuk memberi injunksi.

Rayuan dibenarkan.]

Case(s) referred to:

American Cynamid v. Ethicon [1979] 1 All ER 504 ***(refd)***

Bina Satu Sdn Bhd v. Tan Construction [1988] 1 MLJ 533 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Government of Malaysia & Ors v. Loh Wai Kong [1979] 2 MLJ 33 ***(refd)***

Hinds v. The Queen [1976] 1 All ER 353 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***

Marbury v. Madison [1803] 1 Cranch 137 ***(refd)***

Mian Bashir Ahmad & Ors v. The State AIR [1982] J & K 26 ***(refd)***

Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Pierson v. Secretary of State for the Home Department [1997] 3 All ER 577 ***(foll)***

PP v. Soon Seng Sia Heng [1979] 2 MLJ 170 ***(refd)***

R v. Secretary of State for the Home Department, ex p Leech [1993] All ER 539 ***(refd)***

R v. Secretary of State for the Home Department, ex p Simms [1999] 3 All ER 400 ***(refd)***

Re Tan Boon Liat [1976] 2 MLJ 83 ***(refd)***

S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***

Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 FC ***(refd)***

Smith v. Inner London Education Authority [1978] 1 Al ER 411 ***(refd)***

Su Ah Ping v. PP [1980] 1 MLJ 75 ***(refd)***

Tan Ah Chim v. Ooi Bee Tat [1993] 4 CLJ 476 HC ***(refd)***

Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors [2002] 2 CLJ 758 HC ***(ovrd)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***

Tengku Hj Jaafar & Anor v. Government of the State of Pahang [1978] 2 MLJ 105 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8(1), 121, 130, 150, 160(2)
Government Proceedings Act 1956, s. 29
Pengurusan Danaharta Nasional Berhad Act 1998, ss. 2, 60, 72
Specific Relief Act 1950, s. 54(d)

Other source(s) referred to:
Row on Injunctions, 7th edn, pp 5-6
TRS Allan, *Constitutional Rights and Common Law*, 1991, vol 11 Oxford Journal of Legal Studies 453

For the appellant - Bastian Vendargon; M/s Jayaraman Ong & Co
For the respondent - Tommy Thomas; M/s Tommy Thomas
For the A-G - Mary Lim SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-85-2002]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

Facts And Background

This is an appeal by the plaintiff in the court below against the decision of the High Court refusing an interlocutory injunction against the second defendant from exercising its rights pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Act").

The background facts of this case are fully set out in the judgment of the learned judge. They may be restated briefly as follows. On 28 May 1983 Bank Bumiputra Malaysia Bhd ("the bank"), the predecessor of the first defendant, granted a loan to Kredin Sdn Bhd ("Kredin") in the sum of RM30 million (in US Dollar equivalent). As security for the said loan a third party charge was created by the plaintiff in favour of the Bank. Kredin defaulted in the repayment of the said loan. On 1 April 1996 judgment was obtained against Kredin for the principal sum of US$17,771,319.06 together with interest, *vide* Kuala Lumpur Civil Suit No. S 23-436-86. The bank also commenced foreclosure proceedings against the charged land. An order for sale was obtained on 7 September 1986. The plaintiff appealed against the said order. The Court of Appeal on 9 March 1998 allowed the plaintiff's appeal and set aside the order for sale. On 13 October 1998 the bank then issued the Form 16D notice under the National Land Code 1965 against the plaintiff demanding payment of the sum of US$57,790,482.20 being the sum due from Kredin to the bank as at 30 April 1998.

The Act came into force on 1 September 1998. On 7 May 1999 pursuant to the provisions of the Act the said loan and charge were vested on the second defendant. The second defendant is a wholly owned subsidiary of the Pengurusan Danaharta National Bhd. ("the Corporation"). By virtue of s. 60 of the Act the provisions of Parts IV, V, VII, VIII and X of the Act, apply to the second defendant.

On 23 January 2002 the plaintiff issued the writ of summons and on 31 January 2002 filed an application for injunction in the following terms:

1. Upon the Plaintiff by its Counsel undertaking to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge should thereafter be of opinion that the Defendants or any of them shall have sustained any by reasons of this Order which the Plaintiff ought to pay, the 2nd Defendant either by its servants or agents or otherwise be restrained from purporting to exercise any purported rights pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587) or the purported vesting certificate dated 7.5.1999, in respect of the charge of the lands Lot Nos. 267, 268, 269 and 271 under G 19450, G 19451, G 19452 and G 19453, Town and Mukim of Kuala Lumpur and without prejudice to the generality of the foregoing, in particular, to Section 57 of the Act and/or Paragraph 5 of the Fifteenth Schedule to the National Land Code 1965, until further order, or till disposal of this civil suit.

2. Costs be in the cause.

3. Such further or other relief.

The application was dismissed.

The learned judge ruled that there was no serious question to be tried. Additionally he held that he had no jurisdiction to issue the injunction by virtue of s. 72 of the Act which reads as follows:

72. Notwithstanding any law, an order of a court cannot be granted:

(a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,

and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

It is to be noted that s. 72 was not part of the Act when it was originally enacted. It came later by way of an amendment *vide* Act A1087. It was published in the Gazette on 31 August 2000, and would in the ordinary way have come into force on 1 September 2000. However, by way of s. 2(1) of the said Act A1087, the amendment took effect retrospectively, with effect from 1 September 1998.

The plaintiff now appeals against the learned judge's refusal to grant the injunction.

Proceedings In This Court

The appeal originally came on for hearing on 11 September 2002 before a differently constituted court (Gopal Sri Ram, Abdul Kadir Sulaiman and Mohd Ghazali Yusoff JJCA). On that occasion counsel for the plaintiff informed the court that the constitutional validity of s. 72 had never been tested at the appellate level. As the pleadings then stood, that issue was not before the High Court. Mr. T. Thomas for the 2nd defendant confirmed this. Both counsel then expressed their desire to have the constitutionality of s. 72 determined by this court. Both counsel therefore applied to amend their respective pleadings. Accordingly by consent of both counsel leave was granted to amend the statement of claim and defence.

In the course of hearing this appeal we decided to invite the Honourable Attorney General to proffer his views on the issues before us. This is because the present appeal concerns a challenge to the constitutionality of a provision in a statute upon which his views would be essential. The Attorney General kindly responded to our invitation and, on the adjourned date, Dato' Mary Lim, Senior Federal Counsel (SFC) appeared on his behalf. We then asked her whether the Attorney General would like to intervene in this matter in view of the serious consequences that the decision of this court may have on the operation of the Act. She informed us that the Attorney General did not wish to be joined as a party but was prepared, however, to assist the court as a*micus curiae*. We wish to place on record our gratitude for the assistance rendered to us by Dato' Mary Lim. We also accept with humility the gratitude expressed to us by the Attorney General through learned SFC for affording him an opportunity to place his views before us.

There are only two main issues raised in this appeal. The first is whether there is any serious question to be tried; the second is whether the High Court has power to grant the injunction in the terms sought by the plaintiff.

We will deal with each of these issues separately.

Serious Question To Be Tried

The issues raised before the learned judge included the question as to whether the plaintiff was an "obligor" within the Act. The other issue related to the question whether the plaintiff's claim was barred by limitation.

The first is a question of law, while the second involves questions of fact. Taking the second point, we need only say that Mr. Thomas in his closing arguments conceded that there were several hotly contested issues of fact on the limitation point, in particular, as to when the cause of action arose. In respect of whether the plaintiff is an "obligor", this is a question which involves the interpretation of that word as defined in s. 2 of the Act, which reads as follows:

> 'obligor' means any person who owes a duty or obligation of any nature whether present or future, or whether vested or contingent, to the seller under or with respect to an asset, including without limitation, an obligor under a credit facility, security or other chose of action.

The interpretation of this provision, in our judgment involves a serious question of law which does not merit summary disposal, on the hearing of an application for injunction. In support of our view we rely on the judgment of the Supreme Court in *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1984] 2 CLJ 13; ([1984] 1 CLJ (Rep) 346). In that case the court was concerned with the interpretation of certain sections in the Specific Relief Act 1950 which it was argued were fatal to the plaintiff's case. The Supreme Court, however, held that these very questions constituted serious question to be tried. We find the following passages in the judgment of Abdul Hamid CJ (Malaya) at p. 16 (p. 351) to be conclusive on the point:

> While we appreciate that these questions are crucial indeed they are the main grounds upon which the plaintiff's case rests, we do not, however, see the necessity at that stage for the learned judge to decide on these difficult points of law.
>
> Suffice for the learned Judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the Court's business to resolve these serious and difficult questions of law at that stage of the litigation? We think not. Lord Diplock in the celebrated case of *American Cyanamid Co v. Ethicon Ltd* formally observed that:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

Applying settled law, we find that there are both serious questions of law and fact in dispute between the parties. The course that the court should adopt where there are such serious questions is to move to the next stage that is to consider the balance of convenience – (See *American Cynamid v. Ethicon* 1979 1 All ER 504).

On the facts that were placed before the learned judge it is plain, in our view, where the balance of convenience lies. It lies in the plaintiff's favour. If the injunction be not granted the plaintiff suffers the risk of losing its immovable property forever. By contrast, if the injunction is granted, the second defendant's right, if any, over the disputed property is merely postponed to after trial.

Accordingly in the ordinary way an injunction should issue against the second defendant. The learned judge was therefore wrong in holding that there was no serious question to be tried and for refusing the injunction on that ground.

This brings us now to the second issue, namely, whether the High Court has power to grant the injunction sought by the plaintiff. This in turn depends upon whether s. 72 constitutes a valid bar upon the power of the court to issue injunction in the usual way. This brings into sharp focus the constitutionality of s. 72.

Constitutionality Of s. 72

In order to determine whether s. 72 runs foul of the Federal Constitution it is necessary as a first step to ascertain whether access to justice is a guaranteed fundamental liberty. If the answer is in the affirmative then at the second stage we have to ascertain whether s. 72 denies such access.

If access to justice is to be a fundamental liberty then it must be accommodated within art. 8(1) of the Federal Constitution. That article provides as follows:

> 8(1) All persons are equal before the law and entitled to the equal protection of the law.

Now what does the word "law" in art. 8(1) mean? The answer, we have no doubt, is to be found in art. 160(2) of the Federal Constitution. That article defines "law" as follows:

> Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

For completeness it is necessary to reproduce the definition of "written law":

> 'Written Law' includes this Constitution and the Constitution of any State.

For present purposes it is also necessary to set out the definition of "Federal Law" under art. 160(2):

> 'Federal Law' means:
>
> (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and
>
> (b) any Act of Parliament.

In the context of the instant appeal the meaning of Federal Law under para. (a) is not relevant.

It is to be noted at once that the definition of "law" in the Constitution is not exhaustive. It is open-ended. Hence, it is not confined to written law. It therefore refers to a system of law that is fair and just. In our judgment, art. 8(1) is a codification of Dicey's rule of law. Article 8(1) emphasises that this is a country where Government is according to the rule of law. In other words there must be fairness of State action of any sort, legislative, executive or judicial. In simple terms no one is above the law. This is exemplified by the fact that even hereditary Rulers have been made liable by the Constitution to be sued or prosecuted before the Special Court.

We find support for the view we have formed as to the content of art. 8(1) from the speech of Lord Steyn in *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577, 606, where he said:

> But counsel addressed the wrong target. The correct analysis of this case is in terms of the rule of law. The rule of law in its wider sense has procedural and substantive effect. While Dicey's description of the rule of law (*Introduction to the Study of the Law of the Constitution* (10th edn, 1968) p. 203) is nowadays regarded as neither exhaustive nor entirely accurate even for his own time, there is much of enduring value in the work of this great lawyer. Dicey's famous third meaning of the rule of law is apposite. He said:

> The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.

This was the pivot of Dicey's discussion of rights to personal freedom, and to freedom of association and of public meeting (see pp. 206-283). It is clear therefore that in the relevant sense Dicey regarded the rule of law as having both procedural and substantive effect. In a valuable essay Professor Jeffrey Jowell has re-examined Dicey's theme: see *'The Rule of Law Today'* in *The Changing Constitution* by Jowell and Oliver (3rd edn, 1994) pp. 74-77. Relying on striking modern illustrations, Professor Jowell concluded that the rule of law has substantive content: see *Hall & Co Ltd v. Shoreham-by-Sea UDC* [1964] 1 All ER 1, [1964] 1 WLR 1240, *Congreve v. Home Office* [1976] 1 All ER 697, [1976] QB 629 and *Wheeler v. Leicester City Council* [1985] 2 All ER 1106, [1985] AC 1054 per Lord Templeman, with whom Lord Bridge of Harwich, Lord Brightman and Lord Griffiths agreed. *Wade Administrative Law* (7th edn, 1994) pp. 24ff and de Smith and Brazier *Constitutional and Administrative Law* (7th edn, 1994) p. 18, are to the same effect. *Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. I therefore approach the problem in the present case on this basis.* (emphasis added.)

We also draw support for our view from the judgment of Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64:

> Accordingly their Lordships are unable to accept the narrow view of the effect of Articles 9(1) (our Art. 5(1)) and 12(1) (our Art. 8(1)), for which counsel for the Public Prosecutor contended. This was that since "written law" is defined in Article 2(1) to mean 'this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore' and 'law' is defined as including 'written law', the requirement of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. To the full breadth of this contention one limitation only was conceded: the arbitrariness, the disregard of fundamental rules of natural justice for which the Act provides must be of general application to all citizens of Singapore so as to avoid falling foul of the anti-discriminatory provisions of Article 12(1).

> Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of *petitio principii*. The definition of 'written law' includes provision of Acts passed by the Parliament of Singapore only to the extent that they are 'for the time being in force in Singapore'; and Article 4 provides that 'any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constituion shall, to the extent of the inconsistency, be void'. So the use of the expression 'law' in Articles 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963 (in our case after Merdeka Day ie, 31st August 1957), and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.
>
> In a constitution founded on the Wesminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such context as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.

In our judgment the view expressed by Lord Diplock in the foregoing passage applies with equal force in this country. See *S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; ([1982] CLJ (Rep) 314), where at p. 65 (p. 315) Abdoolcader J (as he then was) said that the view of Lord Diplock in *Ong Ah Chuan* "that 'law' in such a context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution referring to that of Singapore **but this equally applies to similar written constitution including ours**. (emphasis added.)

Since "law" includes common law, an enacted law must satisfy the common law test of fairness if it is to pass muster under art. 8(1). One of the fundamental principles of the common law is access to justice. That much is evident from the following two cases. In *R v. Secretary of State for the Home Department, ex parte Leech* [1993] All ER 539, Styen LJ stated:

> Now we turn to a principle of greater importance. **It is a principle of our law that every citizen has a right of unimpeded access to a court.** In *Raymond v. Honey* [1982] 1 All ER 756 at 760, [1983] 1 AC 1 at 13 Lord Wilberforce described it as a 'basic right'. Even in our unwritten constitution it must rank as a constitutional right. (emphasis added).

In *R v. Lord Chancellor, ex. P. Witham* Laws J (as he then was) at pp. 787, 788:

> It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right to access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In *Ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the Court of Appeal accepted, as in its view the *ratio* of their Lordships' decision in *Raymond v. Honey* [1982] 1 All ER 756, [1983] 1 AC 1 vouchsafed, that it could also be done by necessary implication. However, for my part, I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.

We pause to make one observation in regard to the foregoing passage. Since England has no written Constitution, Parliament is supreme in that country. Hence, Laws J's proposition that it is open to the English Parliament to restrict or deny access to justice is entirely correct in the context of the British Constitution. But it has no relevance to Malaysia because here it is not the law made by Parliament that is supreme: it is the Federal Constitution which is the supreme law. (See art. 4(1)4). There are of course serious attempts being made by English courts to bring the British Constitution as close as possible to a written constitution.

Thus in *R v. Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400 at p. 412, Lord Hoffmann said:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. **The constraints upon its exercise by Parliament are ultimately political, not legal**. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. *In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.* (emphasis added.)

In Malaysia, unlike the British Constitution, the position is reversed. Here, the ultimate constraints upon legislative power are not political but legal that is to say that any law passed by Parliament must meet the fairness test contained in art. 8(1).

We would sum up our views on this part of the case as follows: (i) the expression "law" in art. 8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law: *Ong Ah Chuan v. Public Prosecutor*; (ii) the doctrine of the Rule of Law which forms part of the common law demands minimum standards of substantive and procedural fairness: *Pierson v. Secretary of State for the Home Department*; (iii) access to justice is part and parcel of the common law: *R v. Secretary of State for the Home Department, ex parte Leech*; (iv) the expression "law" in art. 8(1), by definition (contained in art. 160(2)) includes the common law. Therefore, access to justice is an integral part of art. 8(1).

Before leaving this part of the case, it is, we think, appropriate to say a word or two about constitutional interpretation. This is because the constitutional provision that is being relied upon to support the right of access to justice is one of those fundamental liberties guaranteed under Part II of the Constitution. In our judgment, the fundamental liberties guaranteed by Part II, including art. 8(1) should receive a broad, liberal and purposive construction.

In *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 2 MLJ 33, Suffian LP equated constitutional interpretation with statutory interpretation. He said:

> It is well-settled that the meaning of words used in any portion of a statute – and **the same principle applies to a constitution** – depends on the context in which they are placed ... (emphasis added.)

No authority was cited to support the above view. However, high authority available at the time supported quite the contrary view. Thus, in *Hinds v. The Queen* [1976] 1 All ER 353, 359, Lord Diplock said:

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading …

It is noteworthy that the Federal Court had, in cases decided contemporaneously with *Government of Malaysia & Ors v. Loh Wai Kong*, referred to the judgment of the Privy Council in *Hinds v. The Queen.* See, *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170 (per Suffian LP); *Su Ah Ping v. Public Prosecutor* [1980] 1 MLJ 75 (per Suffian LP).

Further, in *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, the majority of the former Federal Court departed from the strict and narrow constructionist view expressed in *Loh Wai Kong.* The majority's approach finds expression in the judgment of Raja Azlan Shah Ag. LP at p. 32 of the report. He said:

> In interpreting a constitution two points must be borne in mind. *First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts"* (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is *sui generis,* calling for its own principles of interpretation, suitable to its character, but *without necessarily accepting the ordinary rules and presumptions of statutory interpretation.* As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' *The principle of interpreting constitutions 'with less rigidity and more generosity'* was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136.
>
> *It is in the light of this kind of ambulatory approach that we must construe our Constitution.* (emphasis added.)

Additionally, we would also quote the following passage from the article *"Constitutional Rights and Common Law"* by TRS Allan, [1991] Vol 11 Oxford Journal of Legal Studies 453 which we find of much assistance:

> No doubt these conclusions reflect the familiar truth that constitutional adjudication may have little in common with the ordinary process of statutory interpretation. A charter of rights needs a liberal and purposive construction if it is truly to safeguard basic liberties. *Constitutional adjudication under a charter of rights is inevitably closer to common law reasoning, where the common law is developed as a vehicle for protecting rights, than to the narrower, more formal manner of statutory interpretation.* A charter, that is to say, must be a statement of principles, inviting a balancing of conflicting interests, much as the common law is truly understood as a body of principles, awaiting refinement and development in particular cases. A statute, by contrast, applies only a body of rules.
>
> In *Hunter v. Southam* [1984] 11 DLR (4th) 641, 649 (Dickson J) the Canadian Supreme Court rightly stressed that, 'The task of expounding a constitution is crucially different from that of construing a statute ... Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties.' But this, of course, is also the task of 'constitutional' adjudication at common law, subject only to express legislative incursion into basic rights and liberties. In the absence of a written constitution, the common law must provide a continuing framework for the legitimate exercise of governmental power. According to the Supreme Court, 'The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.' The chief purpose of the common law must surely be to offer similar protection, within the limits of reason (and subject to legislative encroachment) to those same rights and freedoms, which it assumes and encompasses. (emphasis added.)

In *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72, a unanimous decision of the Full Bench of the Supreme Court, Lord President, Abdul Hamid Omar, after referring to Lord Wilberforce's Delphic pronouncement in *Minister of Home Affairs v. Fisher* went on to say as follows:

> In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in Attorney General of the Commonwealth, ex relatione *McKinley v. Commonwealth of Australia* [1975] 135 CLR 1 at p. 17:

> the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.
>
> In our approach to this appeal we have accordingly kept in the forefront of our minds the principles aforesaid.

In a later passage (at p. 712 of the report), the learned Lord President when discussing the judgment of Dr. Anand J (later Chief Justice of India) in *Mian Bashir Ahmad & Ors v. The State* AIR [1982] J & K 26 said:

> The main judgment which constituted the minority opinion was delivered by Dr Anand. The most pertinent point of his Lordship's judgment on the correct approach to adopt in determining whether the impugned legislation violates the fundamental right guaranteed under art. 19(1)(c) of the Constitution was that (at p. 59 para 101):
>
> > the legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but *it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental rights guaranteed under art. 19(1)(c) or to make the exercise of that right 'ineffective or illusory'*. (The emphasis is that of the Lord President.)
>
> In so holding, his Lordship relied upon the judgment of the Supreme Court of India in *Smt Maneka Ghandi v. Union of India* AIR [1978] SC 597 at pp. 632-633 where the entire case law on the point was considered, and where their Lordships explained, that the word 'direct' would go to the quality or character of the effect and not the subject matter; and, on the other hand, they pointed out:
>
> > that the test of "inevitable" consequence "helps to quantify the extent of direction necessary to constitute" infringement of a fundamental right. Now, if the effect of state action on a fundamental right is direct and inevitable, then a *fortiori* it must be presumed to have been affected ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of art 19(1)(a) or (c).
>
> Explaining the expression 'direct and inevitable effect' as used by their Lordships in *Smt Maneka Ghandi*'s case, Dr Anand said (at p. 59 para. 102 col 2) that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.

He then proceeded to conclude as follows:

> Since the inevitable effect of s. 24G(a) is that it makes the exercise of right of association guaranteed under art 19(1)(c) ineffective and illusory in so far as legislators are concerned, it must be held to be unconstitutional.
>
> *We share Dr Anand's view taken from the Supreme Court decision in Smt Maneka Gandhi's case, that in testing the validity of state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.* (emphasis added.)

It is to be noted that the unanimous view of the Supreme Court as reflected in the above-quoted passage in the judgment of the learned Lord President to which we have lent emphasis was echoed by Gunn Chit Tuan SCJ in his judgment *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125; ([1992] 1 CLJ (Rep) 72) at p. 1138 (p. 87) of the report. His lordship there said as follows:

> I would again agree with Bhagwati J in *Maneka Gandhi v. The Union of India* that 'the test which must be applied is whether the right claimed is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that **the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right'**. Applying that test, I am of the view that the right claimed by the respondents in this case, ie the right to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature …

We would add that the conclusion which we have arrived at, namely, that access to justice is an integral part of the constitutionally guaranteed fundamental liberty enshrined in art. 8(1) is based on the principles of construction stated by Raja Azlan Shah Ag. LP in *Dato' Menteri Othman Baginda* and by the test laid down by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor*.

What Is The Net Effect Of S. 72?

Section 72 by its terms prohibits a court from, *inter alia*, granting an injunction against the second defendant. But it does not prevent the issuing of an injunction in the second defendant's favour. The section therefore seeks to immunise the second defendant which is a private limited company from being restrained in any manner whatsoever, however illegal its acts may be. In other words, the second defendant enjoys blanket immunity from injunctive relief.

In our judgment, adopting the principle stated by Lord Steyn in *Pierson v. Secretary of State for the Home Department (supra)* s. 72 is contrary to the rule of law housed within art. 8(1) of the Constitution in that it fails to meet the minimum standards of fairness both substantive and procedural by denying to an adversely affected litigant the right to obtain injunctive relief against the second defendant under any circumstances, including circumstances in which the Act may not apply.

Take this very case. It is the plaintiff's argument, as already stated, that it is not an "obligor" within the meaning of that expression appearing in the Act and that the second defendant is therefore not entitled in law to sell the land in question. If the Act is enforced, the land sold and it later transpires that the plaintiff was right in its argument the land would forever be lost to it. It is the argument of learned counsel for the second defendant that in such event, the plaintiff may recover damages from the second defendant. With respect, this argument falls on principle. For it is settled law that land is always deemed to have a special value the loss of which may not be adequately compensated by an award of damages. See, *Tan Ah Chim v. Ooi Bee Tat* [1993] 4 CLJ 476, where Edgar Joseph Jr. SCJ at p. 494 said:

> Land is always deemed to have a special value the loss of which may not be adequately compensated by damages.

The other argument is that advanced by learned SFC, Dato' Mary Lim. It is that the Act is a special law specifically enacted to meet an economic exigency. The Act was passed in the public interest and for the public good. She urged the court to take judicial notice of the financial crisis that the world underwent in the dying years of the last Century. She also invited the court to have regard to the preamble to the Act which uses the phrase "public good". It was also urged that the Act was of a temporary nature and that this was an important consideration to bear in mind when determining constitutionality. Based on these matters she argued that s. 72 should be upheld and not struck down as unconstitutional.

With respect we are unable to agree with these arguments. Firstly, all Acts of Parliament are passed in the public interest and for the public good. It is therefore a hollow suggestion that a particular Act be upheld as being constitutional based on this consideration purely because that purpose appears in the preamble. Further, it is well settled that when the constitutionality of a statutory provision is called into question the courts as the judicial arm of the Government of the Federation are not concerned with the propriety or expediency of the impugned law. In short, Parliamentary motive is irrelevant

to the issue of constitutionality. Here we would quote the following passage in the judgment of Lord Diplock in *Hinds v. The Queen* which was applied by Raja Azlan Shah FJ in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187:

> So in deciding whether any provisons of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

Secondly, it is settled law that a preamble may not be used as an aid to interpret a provision in a statute which is clear and unambiguous. As observed by Abdoolcader J (as he then was) in *Re Tan Boon Liat* [1976] 2 MLJ 83, 85:

> Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down by reference to it. It is accordingly clearly settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity.

Now it is important to bear in mind here that there is no invitation before us to declare the whole of the Act unconstitutional. The attack is limited to s. 72. If s. 72 were ambigious, that is to say, constitutional if read one way and unconstitutional when read in another way, then, we may legitimately have resort to the preamble to the Act to read it in such a way as to keep it within constitutional parameters. In other words, the preamble may save it in those circumstances. But s. 72 is clear and unambiguous in its terms. There is no doubt about what it means and its effect. It says in the clearest terms that there shall be no order of restraint against the respondent whatever the facts of a case may be. Hence, applying the principle stated in the above mentioned

case, the preamble to the Act cannot be prayed in aid to interpret s. 72. And, as we have already said, on its plain language s. 72 runs foul of art. 8(1) of the Constitution. In our view, the preamble to the Act cannot save s. 72.

Thirdly, we agree that the court can take judicial notice of the fact that the Act was passed to meet an economic exigency. However, it is to be noted that the Act is not a special law made pursuant to art. 150 to meet a threat to the economic life of the nation. It is an ordinary Act of Parliament passed for a particular purpose, namely to deal with non-performing loans. Like any other Act its provisions must not be inconsistent with the Constitution. Had s. 72 been drafted so as to retain the discretion that a Court of Equity has in the grant of an injunction then no complaint may be made against the section. The grant of an injunction is after all in the discretion of the court. It is not an unprincipled discretion. It is a discretion that is subject to correction by an appellate court. One of the considerations in the grant of an injunction is public interest. In appropriate cases injunction may be refused against the second defendant, *inter alia*, on the ground of public interest. Section 72 however completely prohibits a court from even exercising its judicial discretion and consequently denies to a litigant the benefit of the minimum standards of fairness.

In *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758 Vincent Ng J, in holding s. 72 to be constitutional referred in passing to s. 29 of the Government Proceedings Act 1956 and to the Specific Relief Act 1950. His lordship said (at pp. 778-779):

> Section 72, though quite unprecedented in its scope, is not wholly without parallel in our law. Section 29 of the Government Proceedings Act 1956 protects the government and its officers from injunctive orders. Section 29 of the Government Proceedings Act 1956 has been upheld in Malaysian Courts (see *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* [1978] 2 MLJ 105 and *Nanthakumaran v. Jaffnese Co-operative Housing Society Ltd & Ors* [1980] 1 MLJ 114). The power of the High Court to grant an interlocutory or final injunction is derived from statute. Common law does not give power to the High Court, or for that matter, any other court to grant injunctive relief. In Malaysia, only the Superior Courts have the statutory power to grant injunctions. Inferior courts like the sessions court or administrative tribunals like the Industrial Court do not possess the power to grant injunctions. The statutory basis for a Malaysian High Court (and that too, a judge of the High Court and not a senior assistant registrar or deputy registrar) is found in s. 25, read together with para 6 of the Sch to the Courts of Judicature Act 1964 and ss. 50 to 55 of the Specific Relief Act 1950. The procedure relating to the granting of injunctions is found in O. 29 of the RHC.

> It follows that what statute can give, statute can also take away or limit. Statutory provisions like s. 29 of the Government Proceedings Act 1956, s. 40(1) of the Societies Act (even O. 29 r. 2C of the RHC is a close parallel) and s. 72 of the Act are examples of Parliament's intention in certain specified and limited circumstances to take away such injunctive power.

With respect we are unable to agree with the reasoning of his lordship in that case for several reasons. First, in respect of s. 29 of Government Proceedings Act 1956, it has been settled by the decision in *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105, the case cited by his lordship in the passage quoted above – a decision that has stood unchallenged for a quarter of a Century – that what s. 29 prohibits are permanent injunctions, not temporary injunctions. This is clear from the following passage in the judgment of Abdul Razak J in that case:

> The judgment of Romer J. in *Underhill v. Ministry of Food* [1950] 1 All ER 593 seems to lend weight to the contention that an interim injunction is not inconsistent with section 21 of the Crown Proceedings Act (which is our section 29(1) of the Government Proceedings) because of his view that the declaration contemplated by the section is a final as opposed to an interim injunction. He said 'I do not think that this court has jurisdiction under section 21 of the Act to make something in the nature of an interim declaration of right which have no legal effect, and which, as I say, might be the very opposite of the final declaration of right made at the trial after hearing all the evidence'. *By implication it must necessarily follow therefore that since the section provides for the giving of a declaration in lieu of an injunction, the injunction so stated must refer to a permanent and final injunction and it does not take away therefore the right of the court to grant an interlocutory injunction*. (emphasis added.)

To remind ourselves, the injunction sought in the present case is temporary and not permanent. The reference to s. 29 is therefore not relevant since that section does not; as does s. 72 of the Act; prohibit the grant of any injunction, temporary or permanent. Similarly, s. 54(d) of the Specific Relief Act – and indeed the whole of s. 54 – is directed at permanent and not temporary injunctions: See, *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 (per Edgar Joseph Jr, J), *Bina Satu Sdn Bhd v. Tan Construction* [1988] 1 MLJ 533 (per VC George J). Both these cases were approved by this court in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293.

Secondly, in our judgment, it is only the constitutionality of s. 72 that is relevant in the present case. The constitutionality or otherwise of provisions in other statutes is not in issue in this case and it is not our role to decide issues not before us. We may add that in the two cases cited by Vincent Ng J in *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors (supra)* the constitutionality of s. 29 was not called into question. No doubt, if and when the constitutionality of s. 29 of the Government Proceedings Act and any other relevant ouster provision is challenged in appropriate proceedings, the courts will have to decide that issue in those proceedings. The matter is simply not *res integra* in this appeal.

Thirdly, in so far as the power of Parliament to grant, limit or remove the jurisdiction of a High Court is concerned, we would draw attention to art. 121 which provides, *inter alia*, that the High Court "shall have such jurisdiction and powers as may be conferred by or under Federal law". It is axiomatic that the "Federal law" in that Article refers to a valid Federal law. Take an extreme example. Let us say that a Federal law is enacted conferring advisory jurisdiction on the High Court. *Prima facie* it is a Federal law that confers a particular jurisdiction. But, it is plain and obvious that such a law will be invalid because it would contravene art. 130 of the Federal Constitution. Indeed, it is on this very basis that an Act of Congress purporting to confer original jurisdiction on the Supreme Court of the United States was held unconstitutional in the leading case of *Marbury v. Madison* [1803] 1 Cranch 137. Thus the Federal law to which art. 121 refers may be held invalid on any constitutional ground available to a litigant. So a bald statement to the effect that what statute gives, statute may take away is an oversimplification of the true constitutional position.

Lastly, we turn to address the finding by his lordship in the passage already quoted, namely, that:

> The power of the High Court to grant an interlocutory or final injunction is derived from statute. Common law does not give power to the High Court, or for that matter, any other court to grant injunctive relief.

With respect, there appear to be two fundamental misconceptions here. In the first place, it is wrong to assume that the power to grant an injunction is derived from statute. As a matter of historical antecedent, the High Court in this country, as a superior Court of Record has inherent jurisdiction to grant injunctions, inherited from the old Court of Chancery which itself issued injunctions pursuant to its inherent power. See, *Row on Injunctions* 7th edn, pp. 5-6. A close and careful examination of the Specific Relief Act and the Courts of Judicature Act reveals that neither statute speaks of jurisdiction being

conferred on the High Court to issue an injunction. So far as para. 6 of the Courts of Judicature Act is concerned it speaks of an additional power – and we emphasise the word power – to preserve property, the subject matter of a cause or matter, *inter alia*, through the means of an injunction. It has nothing whatsoever to do with jurisdiction. And as Thomson CJ said in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1:

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance **there is a distinction between the jurisdiction of a Court and its powers**, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers. (emphasis added.)

To illustrate the point we make, we refer to the judgment of Edgar Joseph Jr J in *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319, where his lordship relied on the High Court's inherent jurisdiction to issue a Mareva injunction. Thus, it is a serious jurisprudential error to speak of either High Court in Malaysia (ie, the High Court in Malaya or in Sabah and Sarawak) as having only statutory jurisdiction to grant injunctions.

In the second place, the reference to common law not conferring power on a court to grant an injunction is a statement of the obvious. As a matter of pure history, the Common Law courts never granted any form of specific relief. The only remedy available at common law was an award of damages. It was for that very reason that the Lord Chancellor, sitting in the Court of Chancery fashioned the various forms of specific relief as we know them today, including the remedy of injunction. But if his lordship in the passage already quoted had in mind to say that even equity does not confer power in a High Court to issue an injunction, then, with great respect we must say that that is a mistake as matter of history.

Conclusion

To conclude, it is our considered judgment that s. 72 fails to meet the minimum standards of fairness as encapsulated in art. 8(1) because it denies the appellant an opportunity to protect his immovable property by means of a temporary injunction under any circumstances whilst not placing any fetter upon the power to grant the same relief in the respondent's favour. By contrast, s. 29 of the

Government Proceedings Act 1956 and s. 54(d) of the Specific Relief Act 1950 do indeed, upon their proper interpretation, meet the minimum standards of fairness because they do permit the grant of temporary injunctions against the Government in appropriate circumstances. The fact that a temporary injunction may be granted by a court does not mean that it will be granted in every case. Temporary injunctions are rarely applied for or granted against the Federal or any State Government because the overriding consideration of the public interest will more often than not turn the balance of convenience against the grant of such an injunction. See, *Smith v. Inner London Education Authority* [1978] 1 All ER 411, per Brown LJ. But that is quite a distance away from saying that a temporary injunction will never be granted under any circumstances.

For the above reasons we hold that s. 72 of the Act is unconstitutional being in contravention of art. 8(1) of the Federal Constitution.

The Result

In the event, for the reasons already given, we allowed the appeal herein and made an order in terms of the summons in chambers dated 31 January 2002. And we further ordered that the costs of this appeal and those in the court below be awarded in favour of the plaintiff. Deposit was also ordered to be paid to the plaintiff.